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AUTHOR De Mott, John
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ABSTRACT

In discussing the teaching of communications law, this paper presents a teaching technique for helping students apply the abstract principles of libel law to real situations by having them discuss an item from a mass publication that is defamatory toward some individual or organization. After presenting a series of questions to be discussed, the paper provides an illustration of how one student analyzed and discussed a libelous article. (TJ)

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ANALYSIS OF A LIBELOUS COMMUNICATION:

LEARNING FROM TODAY'S EVENTS

The explanation of a special out-of-class assignment helpful in increasing the journalism student's sensitivity toward defamation and the frequency with which it occurs, under defensible conditions.

By

John De Mott

Associate Professor

Temple University

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Virtually every issue of any medium of mass communication contains at least one item including statements defamatory toward some individual or organization.

Such items offer students of communications law a beautiful opportunity to apply knowledge being acquired from textbook and cases to the "real world" of today.

And, to the professor, such opportunities offer helpful feedback concerning how well students are learning to apply abstract principles extracted from the textbook and its cases to situations about which no prior knowledge exists.

Because an assignment to analyze a libelous publication involves creating speculation, in addition to the exploitation of a familiarity with the evolution of libel law as developed through past cases and decisions, the assignment can be exciting, or "fun," even.

Because the naive student tends to think a libelous publication is one that has no defense--"They wouldn't print that, would they," he or she frequently asks, if it were libelous?"--the adventure begins with a review and discussion of the following observations made several years ago by Robert Phelps and Douglas Hamilton in their book Libel:

> A careful reading of the laws and court decisions clears away a misconception common not only among newsmen but also among lawyers and judges--that to say a story is libelous means that the person named in it can recover damages. That is not true. To say a story is libelous merely means that the person has been defamed. He will recover damages only if there is no defense in the libel law for publishing the article. A lawyer charged in print with ambulance chasing has been defamed, but he can collect damages only if his accuser can show no legal defense for the publication. Libel is not a defenseless publication; it is a publication requiring a defense.
>
> Pursuit of the same thought will dissolve another widespread misconception--that to be libelous a statement must be false. That too, is erroneous, even though some statutes define libel as "false defamation." What they mean is that a statement is actionable, that is, it contains a sound basis for the award of damages, only if it is false. Truth does not enter the case when the court is determining whether the words are defamatory. It is just

as libelous to write that a lawyer is an ambulance chaser, if he really does find clients by following up accident reports in the newspapers, than if he slavishly adheres to the bar association's code of ethics. In the eary part of the case the court assumes that the libel is false. Later the defendant has the opportunity to prove that he had a right to publish the libel either by proving the statement true or by invoking some other legal defense.

The extensive limits of their happy hunting ground having been described thusly, students are then given a sheet of detailed instructions that include these questions:

1. Why is the item libelous?

2. Who, specifically, is damaged? In what way--or ways?

3. What defenses might be used, should the medium be sued by the person damaged?

4. Why would those defenses be applicable in this case--presumably, because of facts in the item itself?

5. What other defenses <u>might</u> a lawyer be able to use, as a result of circumstances not apparent in the item's content but which perhaps exist in the specific circumstances of your example? In addition, speculate briefly on what the defense attorney would most logically try to do in any lawsuit that might result from publication or broadcast of this item. Then speculate a bit further on the logical strategy and tactics of the plaintiff's attorney in such a case.

While each student immerses herself or himself in his or her search for an interesting libelous publication to analyze, a practice session is conducted, using this fictitious item suggested by an actual article in some newspaper:

> Is this the way Lois Lane got started? What would Brenda Starr do if a candidate she was covering made a pass? "I asked him if there was anything else he wanted to talk about in the interview," recalls 22-year-old Daily News intern Sally Forth. 'He said yes there was. He said 'sex.'" The perils of journalism revealed themselves to Sally in an encounter the News calls full of "urid details." Wherein she learned that "the words candidate and gentleman do not necessarily go hand in hand." Sally, a journalism student at Euphoria State University, had been assigned to interview Conservative-Liberal candidate John Doe, an employee who's running for State Senate against Richard Roe. "I had spoken to her maybe three times before that," Doe told us last night. "Twice on the phone, and once I walked over and gave her my brochure. When she asked for the interview, I picked out Joe's restaurant on Thirteenth St., which is east of her office. We sat in the back and I had my lunch. She wasn't eating too much." The menu had a few surprises. "All during the interview, says Forth, "he kept asking me where do you work, can I pick you up after work, let's go out to dinner. He just kept alluding to him and me together." Not so, says the candidate. "I don't understand what's happened," says Doe, "except that as a bachelor of 40 years old, in conversation, the only remark I made was would you want to go out for dinner or something

later on: She said 'I don't think my boyfriend would allow it.' I said okay, fine, and laughed or chuckled." When the intereview ended, says Forth, "I asked him if there was anything I had missed or anything else he wanted to alk about and he said yes there was. He said sex." Doe: "We walked out, and I said are you sure you don't want to go for dinner? She said no. I gotta eat anyway, and I thought I was paying to any girl respect and nothing else, extending an invitation to dinner, not to bed or anything--you know, I'm afraid to use the word at this point." Meantime, Sally's terribly upset about her experience: "I mean, I'm not there to be leered at. I'm a reporter. It wouldn't have happened to a male reporter." As for Doe, who lives with his mother, he doesn't "see anything wrong with a politician dating a reporter. If two people are single, you gotta meet people, why not?" As for the News (which refused to endorse either Doe or Roe), it suggested "that in future races, Boss Bigge and his Radical-Reactionary minions return to the practice of picking their candidates in the three-piece-suit department and not in the raincoat section."

In practice sessions, students are encouraged to explore all possible developments that can be imagined, and to explain the ways in which different defenses or principles of libel law would apply.

Since students are tempted to accept statements in the publication at face value--as facts--and to forget, frequently, that the reader has no idea what facts may have been left out of the story, even a brief item opens up many avenues that can be explored.

For example, one student did a quite good job on a one-paragraph news report from which this item has been adapted:

> In Peculiar, Missouri, Mrs. Hattie Hoburg, an unusually plump woman, spent four days, including New Year's Eve, in her bathtub where she became helplessly lodged during one of her infrequent attempts at bathing. Mrs. Hoberg was helped from the tub after police were alerted by concerned neighbors. Her condition was "surprisingly good," though according to Patrolman Theodore Fuzz, "she was real hungry."

"The item is clearly libelous," Walter Heindl pointed out, "in that it states that Mrs. Hoburg bathes infrequently. The statement presumably damages her normal right to social intercourse, and may cause her to be shunned. Furthermore, the time clearly identifies Mrs. Hoburg, stating her full name and place of residence.

"This case could be difficult to defend," Heindle observed. "There is no libel defense that could reasonably be construed to apply to this case.

"First, the New York Times v. Sullivan defense would not apply. Mrs. Hoburg is not a public figure by any stretch of the imagination. The incident is, rather, a private matter in the life of a private person. The Rosenbloom rule would probably not apply, as the incident is not a matter of "great public concern;" furthermore, the fuling has been modified and could likely be overturned by a case such as this, if it were held to be applicable (as opposed to distinguishable). Even without the Gertz case's limitations on who is and who isn't a public figure, no court probably would consider her a public figure, even though the item might have been reported in the press, which is presumably where the Spectator picked up the story. (Incidentally, the magazine might be open to a privacy invasion suit, as well.)

Second, the defense of reportorial privilege would not apply, as the circumstances in this case are not related to any privileged governmental proceedings.

"Third, the article could not be construed as 'fair comment,' in that it makes factual allegations about Mrs. Hoburg's bathing habits.

"The only defense that the magazine would have is that of truth. However, it would be most difficult to prove that Mrs. Hoburg bathes infrequently, though the other items could probably be proved. Even if the charge could be demonstrated, the magazine might still be liable for an invasion of privacy suit, and if Mrs. Hoburg has a savvy lawyer, that's the course he would follow.

"The magazine could offer, as a partial defense, that it relied on a source, known to be reliable, who stated that Mrs. Hoburg bathes infrequently. That would not be a likely situation, however.

"In other words," Heindle explained, there are really no solid defenses for the magazine. The common law standards of negligence are much broader than the Sullivan case standards of 'reckless disregard.' If the charges are untrue, it is hard to believe that any publication would print them without attempting to verify them, or without any kind of documentation, as the item is so clearly libelous of a private individual. The New York Times v. Sullivan requirement of actual malice would not apply.

"In short, if I were the attorney for the magazine, and unless there was some mitigating circumstance (such as consent, which is unlikely), and a libel action were brought against the magazine, I would advise the magazine to settle out of court, and consider whatever is agreed upon to be a bargain.

"If I were the plaintiff's attorney in this case," Heindl observed, "I would begin by establishing the libelous nature of the publication, and that it clearly identified the plaintiff. I might introduce witnesses to testify that the article harmed the plaintiff's reputation, and that the plaintiff was indeed understood to be the person mentioned in the article.

"I would under no circumstances attempt to prove the charges false, for several reasons. First, the burden of proof for the truth of the libelous charge is on the defendant. Second, any witnesses I introduce would be subject to cross-examination. In other words, I would let the defense try to get its own witnesses (in a civil action, the sixth amendment does not apply); I would not offer it anything to go on. The defense would benefit more than the plaintiff if I attempt to disprove the charges.

"I might, however, take the initiative in arguing the inapplicability of various defenses, even though the burden of proof is again on the defendant to demonstrate the applicability of privilege. I would argue that the plaintiff is not a public figure, under the meaning of the New York Times v. Sullivan (as expanded) standard. I would cite the Gertz case, and argue that, if Gertz was excluded as a public figure in his circumstances (and his is a case that could have gone either way), certainly Mrs. Hoburg, who, presumably, was not conducting the public's business in that bathtub, isn't a public figure. Of course, if the charge was published in another publication, this would in no way lessen the libel (I would sue the original publication, if that is the case, to restrain otherpublications from picking up the item, and also because the Spectator doesn't have any money.)

"In conclusion," Heindl stated, "the magazine has set itself wide open for a libel suit, unless, of course, the story is an utter fabrication. Even in such a case, if there is a Hattie Hoburg in Peculiar who might be identified with the article,

there could still be a libel suit. This is a good case where plaintiff's attorney would be willing to speculate on a percentage of the judgment, in lieu of a fixed retainer. I would not wish to defend this case."

Such an imaginative exploration of possibilities suggested by a publication like that selected b Walter Heindl gives an instructor a much better reading of the student's true understanding of libel law and its application than a recitation inspired by a memorization of the textbook's discussion.

The instructor's critique, in return, can be more creative--more helpful, therefore.

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